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Nos. 15-1111 and 15-1112

IN THE

Supreme Court of the United States

BANK OF AMERICA CORPORATION, ET AL., PETITIONERS,

v.

CITY OF MIAMI, FLORIDA, RESPONDENT.

WELLS FARGO & CO., ET AL., PETITIONERS,

v.

CITY OF MIAMI, FLORIDA, RESPONDENT.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will address the following question:

The FHA requires plaintiffs to plead proximate cause. Does proximate cause require more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies?

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BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

Amicus curiae, DRI–The Voice of the Defense Bar, respectfully submits that the judgments of the United States Court of Appeals for the Eleventh Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and blanket letters of consent are on file with the Clerk's Office.

DRI's interest in this case arises from its support of reasonable rules for defining the scope of liability for federal statutes that will at once permit them to serve their remedial ends and at the same time ensure proportionate levels of civil liability. The foreseeability limitation that the Eleventh Circuit has proposed in this case is virtually no limitation at all, and it creates perverse incentives for municipalities to bring lawsuits that consolidate speculative harms to numerous residents by means of statistics without being subject to the rigorous analysis required for class actions. Allowing plaintiffs to recover damages for injuries based on such remote causal connections to the alleged wrongful conduct results in nearly infinite and unpredictable liability. Judicial adoption of such a system is incompatible with the fair administration of the civil justice system. And it is inconsistent with decades of widely-accepted limitations on causation in the arena of tort law.

SUMMARY OF ARGUMENT

When Congress adopts a tort action, like an action for compensation of a victim of housing discrimination, it does so against the background of ordinary, common-law rules. Unless Congress expresses a contrary intent, it is presumed to engraft those principles into its legislation. Those ordinary rules include the requirement that a plaintiff must show a direct connection between the asserted injury and the alleged wrongful conduct.

In the case of economic injury like that asserted here, the Eleventh Circuit's foreseeability-only approach is never appropriate. "[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing* v. *La Chusa*, 771 P.2d 814, 830 (Cal. 1989). Without a rule of "directness," defendants will be exposed to practically limitless liability, to remote plaintiffs Congress never intended to protect, for remote and incidental economic harms Congress never intended to remedy.

Nothing in the text of the Fair Housing Act suggests that Congress intended anything other than the ordinary rule of proximate cause—including the direct-connection requirement—to apply. And all of the reasons that have supported applying that rule in other contexts apply with equal force to the FHA. Accordingly, this Court should apply the same rule to the FHA that it has to other statutes and require a direct connection between the asserted injury and the alleged wrongful conduct.

The Eleventh Circuit's foreseeability-only approach to proximate causation allows municipalities and presumably other entities like states, unions, trade associations, churches, synagogues, and other houses of worship, to assert damages flowing from injuries to their citizens or members, and bring the claims in their own right. Conversely, the logical next step to the City of Miami's claim in this case is a class action of Miami taxpayers arising from the same factual basis, asserting damages based on increased tax assessments or diminished municipal services. The foreseeability-only approach also creates problems of duplicative liability to immediate and remote claimants as well as situations where direct claimants are unable to prove causation but remote claimants are able to aggregate claims of hundreds, thousands, or more citizens or members to "prove" injury through statistical analysis. In the absence of congressional intent to the contrary, the Court should not graft the City of Miami's gross expansion of statutory-tort liability onto the United States Code.

ARGUMENT

I. Congress cannot be presumed to intend liability for all incidental economic harms that could foreseeably flow to remote parties.

The Court has noted that an action brought for compensation by a victim of housing discrimination under the FHA is effectively a tort action. *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003) (citing *Curtis* v. *Loether*, 415 U.S. 189, 195–96 (1974)). "[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Ibid.* (citing *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999)). Where Congress "has not expressed a contrary intent, the Court has drawn the inference that it intended ordinary rules to apply." *Id.* at 287.

The general presumption that Congress enacts tort-like legislation subject to ordinary liability rules operates both to expand and limit liability. In *Meyer*, the Court held that common-law tort rules make corporate employers vicariously liable for wrongful discrimination by their employees or agents. 537 U.S. at 285. Though the FHA "says nothing about vicarious liability," the Court applied the general presumption that Congress "intends its legislation to incorporate those rules." *Ibid.* By the same token, the Court also held that the courts could not extend liability beyond the ordinary parameters of vicarious liability to corporate officers and owners, when "Congress said nothing in the statute or in the legislative history about extending vicarious liability in this manner." *Id.* at 286.

One of the rules limiting liability is that there must be a direct connection between the asserted injury and the alleged wrongful conduct. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." W. Keeton et al., Prosser and Keeton on the Law of Torts § 36, at 229–30 (5th ed. 1984) ("Prosser"). "To prevent 'infinite liability,' . . . courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 701 (2011). Those limits include "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

The Court has regularly applied this principle in contexts like this one, where the asserted economic injury derives indirectly from a wrong visited upon a third party. See, *e.g.*, *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 540–41 (1983) (Clayton Act); *Holmes*, 503 U.S. at 268 (RICO). This is because at common law, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268–69.

This rule exists not only to serve the practical purposes discussed below, but also because Congress is presumed to enact laws that are just, and justice dictates a degree of proportionality. Long ago, courts recognized that if anyone is allowed to sue for

indirect economic injuries that might flow from the wrongful injury to another person, the causes of action from a single wrong "would be infinite." *Dale* v. *Grant*, 34 N.J.L. 142, 149 (Sup. Ct. 1870) (dismissing the actions by purchasers against a wrongdoer who rendered the manufacturing company unable to fulfill their orders); accord *Connecticut Mut. Life Ins. Co.* v. *New York & New Haven R.R. Co.*, 25 Conn. 265, 274–75 (1856) (dismissing an action by the insurer in its own name against a wrongdoer who caused the death of the insured and thereby triggered the insurer's obligation to pay). "Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property," *Connecticut Mut.*, 25 Conn. at 274–75, that a direct-connection rule limiting the scope of actionable economic injury is necessary to ensure a proportionate degree of liability. See *Palsgraf* v. *Long Island R. Co.*, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (noting that the doctrine of proximate causation comes in part from a "rough sense of justice").

The foreseeability-only rule cannot accomplish this limiting purpose for purely economic harms like those presented here. Just as an antitrust violation "may be expected to cause ripples of harm through the Nation's economy," *Blue Shield of Virginia, Inc.* v. *McCready*, 457 U.S. 465, 476 (1982), a pattern of housing discrimination can likewise be expected to cause ripples of harm through the local housing market and economy. In both instances some economic harm to those having a market relationship to the directly injured party is arguably "foreseeable," even if indirect and distinctly remote.

If the only connection required to assert a claim for damages is some foreseeable economic relationship between the party discriminated against and the plaintiff, however remote, then the next logical step in a case such as this is a class action by taxpayers. Under the Eleventh Circuit's unlimited foreseeability test, the taxpayers could assert a foreseeable connection because it is to be expected that when a city's resources are diminished, there will necessarily be a loss of services or an increase in taxes. This unlimited potential for liability is contrary to fundamental principles of the common law governing tort causation.

It is reasonable to assume that Congress did not intend to allow every person suffering incidental economic harm from discriminatory conduct against a third party to recover under the FHA, just as it "is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to this business or property." *Blue Shield*, 457 U.S. at 477. Limiting claims for economic injury to those directly caused by the wrongful conduct ensures that only plaintiffs who were actually victimized by the wrongs contemplated in the statute may sue for redress.

Based on statutory language, the Court has on occasion departed from the ordinary rules of causation. For instance, "in comparison to tort litigation at common law, 'a relaxed standard of causation applies under [the Federal Employers' Liability Act ("FELA")].'" *CSX Transp.*, 564 U.S. at 692 (quoting *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 542–43 (1994)). However, the Court did not reach this

conclusion based on a mere presumption, as the Eleventh Circuit did in this case. It reached that conclusion based on FELA's special liability/causation language, which states that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (emphasis added); see *CSX Transp.*, 564 U.S. at 691.

The FHA, on the other hand, contains no special causal language; its language is generic. It provides a civil action to anyone who "claims to have been injured by a discriminatory housing practice." 42 U.S.C. §§ 3602(i), 3613(a)(1)(A). As explained below, this language gives no indication that ordinary causation rules should not apply, including the rule limiting liability to the injuries directly caused by the wrongful conduct.

II. Congress presumably intended the FHA to redress only those injuries that directly result from wrongful conduct it prohibited.

This Court has looked first to the statutory text and then to the legislative history to determine whether Congress intended to eschew the ordinary proximate-cause rules. With respect to the FHA, neither one rebuts the presumption that Congress intended to incorporate the direct-connection rule. The Court has also considered whether the policy reasons for the rule support applying it to that statutory scheme. They do for the FHA.

A. Nothing in the text or legislative history of the FHA indicates an intent to dispense with the direct-connection requirement.

The City of Miami has sued because it "claims to have been injured by a discriminatory housing practice," as is required to commence a civil action under the FHA. See 42 U.S.C. § 3613(a)(1)(A); 42 U.S.C. § 3602(i). The Eleventh Circuit correctly observes that the FHA's language is "broad and inclusive." App. 37a. But it is no broader than § 4 of the Clayton Act, to which this Court applied the direct-connection requirement. The Clayton Act states: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." 15 U.S.C. § 15. This language is "broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation," but it is still presumed that Congress intended the direct-connection requirement to apply. *Associated Gen. Contractors*, 459 U.S. at 529. The same must be true here.

As for legislative history, the Eleventh Circuit relies on the fact that proponents of the FHA believed "those who were not the direct object of discrimination had an interest in ensuring fair housing, as they too suffered." App. 37a. This is certainly true. But it does not follow that Congress intended to allow municipalities to act as private attorneys general for the purpose of vindicating purely pecuniary interests of their community.

Every federal statute is in some sense intended to advance the general welfare. The FHA aims to accomplish this specifically by remediating invidious racial and ethnic discrimination in the area of

housing, not by refilling the treasury of the local municipality or its general taxpaying population. Nothing in the text or the legislative history of the FHA indicates that Congress wished to set aside the traditional direct-connection inquiry for FHA claims.

B. The reasons for applying the direct-connection requirement to antitrust laws and RICO apply with equal force to the FHA.

In the context of antitrust law and the Racketeer Influenced and Corrupt Organizations Act (RICO), the Court has articulated several practical reasons for refusing claims of economic harm flowing indirectly from wrongs committed against third parties. First, it is "more difficult . . . to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Holmes*, 503 U.S. at 269. Second, "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Ibid.* Third, "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269–70.

These concerns are relevant not only to antitrust law and RICO claims but also in many other contexts, including civil rights actions. Applying these policies to this civil rights action under the FHA demonstrates the point.

As the district court recognized, it is exceedingly difficult to determine with any reasonable certainty what amount of lost tax revenue and resource expenditures were attributed to unfair lending practices (if proven), given all of the other economic factors responsible for the City's losses. At a macro-economic level, the decline in property values in Miami was precipitated by numerous circumstances including the historic inflation and crash of the housing market, the Great Recession that followed, the resulting significant rise in unemployment, the conduct of third-party mortgagors servicers, other lenders, and so on. App. 70a; see J.A. 118–37, 161–63. Indeed, many researchers have concluded that it was the decline in home prices that precipitated widespread defaults on subprime loans, not vice versa. See J.A. 128–30 (citing numerous studies).

Miami's loss of tax revenue was also the result of various factors including the decline in property values, Florida's property-tax reforms, the county's foreclosure on tax liens, and borrower-specific hardships such as loss of employment, familial death or illness, and marital difficulties. See J.A. 118–37, 161–69. Homeowners abandon their mortgages and their homes and housing markets depreciate in value for many reasons. Any determination as to what portion of Miami's housing market depreciation and blight to attribute to the alleged discrimination would require far more speculation than should be allowed in a court of law. Cf. *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 458–61 (2006) ("Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices.").

The City's proposal to determine this attribution using complex hedonic regression analyses only proves the point. Hedonic regression analysis attempts to isolate various factors that contribute to a property's value, and determine each factor's contribution. E.g., J.A. 336. The City expects courts to put great faith in statisticians' ability to isolate and quantify the effect of foreclosures attributable to Bank of America or Wells Fargo on adjacent home values. E.g., J.A. 337. Here is how one author describes hedonic analysis of a housing market:

> Imagine, for a moment, that you are a private investigator or market researcher studying the demand for food. You have a particular disadvantage, however, in that you have been banned from entering the local grocer. You have found a place outside where you can sit and photograph shoppers as they approach the checkout counter, and from these photographs you can pretty much tell what foods each customer has purchased (although some items may be obscured in the shopping basket) and the total cost of all items combined. By bribing a contact at the local bank, you are able to find out each shopper's income. That is all the information you have. From this, can you infer the demand for eggs? Can you determine how much households would be willing to pay to remove sugar import quotas?

Stephen Sheppard, *Hedonic Analysis of Housing Markets*, in *Handbook of Regional and Urban Economics* (1999).

If this statistical approach is even workable in the wake of an unprecedented housing-market crisis with its varying effects on different submarkets and segments of the population, it offers little more than an educated guess as to how much influence a given foreclosure would have had on home values, as compared to other macro-economic factors. It also does not even begin to isolate which foreclosures involved discriminatory loan terms (if any), and which were caused by borrower-specific circumstances—such as job loss, familial illness, marital dissolution, etc.—regardless of the loan's terms.

Duplicate recoveries may also be a concern in this case, given the various government-entity millages that are collected together by Miami-Dade County, and could result in different tax rates for different Miami neighborhoods, further complicating the apportionment of damages significantly. Beyond this case, if foreseeability is the only causal limitation, then the Court is likely to soon see a class action of taxpayers on the horizon. If both the city and a class of taxpayers sue (perhaps because one is not satisfied with the other's choice of legal counsel), then the court must allocate damages between the city and those in the class, according to an indeterminate number of factors, including the percentage of the city's economic harm transferred to those in the class versus those not in the class, their collective or individual tax rates, the perceived value of reduced fire- and law-enforcement services, and so on. See *Associated General Contractors*, 459 U.S. at 543-44, 551 (viewing this concern as one of several justifications for applying the direct-connection requirement to the Clayton Act generally, despite the

dissent's view that no such problem existed in that particular case); see also *Anza*, 547 U.S. at 459 (holding that application of the direct-connection requirement was warranted by the two other concerns discussed in *Holmes*, "[n]otwithstanding the lack of any appreciable risk of duplicative recoveries").

Third, as in the case of antitrust laws, "the need to grapple with these problems"—of sorting out all of the independent factors, weighing their relative influence on the City's losses in comparison to the specific circumstances of each individual loan and borrower, and allocating damages to avoid duplicate recoveries—"is simply unjustified by the general interest in deterring injurious conduct." *Holmes*, 503 U.S. at 269–70. Not only can direct victims file suit to enforce the FHA's anti-discrimination provisions, but HUD and the Attorney General can as well. See 42 U.S.C. §§ 3610, 3612, 3613, 3614. And they all do. A simple search of legal databases shows that the cases brought for violation of the FHA number in the thousands, and these include cases where borrowers allege discriminatory loan terms. E.g., *Rodriguez* v. *Nat'l City Bank*, 726 F.3d 372, 374–75 (3d Cir. 2013); *Grimes* v. *Fremont Gen. Corp.*, 785 F. Supp. 2d 269, 290 (S.D.N.Y. 2011).

Because of the problems inherent in a foreseeability-only rule, the "general tendency of the law, in regard to damages at least, is not to go beyond the first step" in the causal chain. *Holmes*, 503 U.S. at 271 (quoting *Associated Gen. Contractors*, 459 U.S. at 534). This Court has gone beyond that first step in only "relatively unique circumstances," where there was virtually a one-to-one correlation between the

injury visited on the third party and that flowing to the plaintiffs, such that the above reasons proved inapplicable. *Lexmark*, 134 S. Ct. at 1394. Doing so was still consistent with the requirement of a direct connection between the asserted injury and the alleged wrongful conduct. It would not be consistent with the direct-connection rule here, as no such correlation is even remotely possible.

CONCLUSION

For the reasons given above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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